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IN THE

Supreme Court of the United States

October Term, 1949

No. 605

PHIL S. COHEN alias P. H. PHILLIPS and LEO ESCOVITCH alias LEO ESCO.

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and Brief in Support Thereof.

SIDNEY G. KUSWORM,
Counsel for Petitioner.

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

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Petitioners,

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UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Phil S. Cohen and Leo Escovitch, respectfully pray that a *Writ of Certiorari* issue to review the decision of the United States Court of Appeals for the Sixth Circuit, in an opinion rendered by Allen, Circuit Judge, affirming the judgment of the Southern District of Ohio, Western Division, convicting petitioners of a violation of Section 1731 (a), title 12, U. S. C.

Petitioners were each sentenced on February 3, 1949 to imprisonment for four years and each to pay a fine of Three Thousand ($3,000.00) Dollars by the District Court following return of a verdict finding Petitioner Cohen guilty as charged in the first six counts of the indictment and finding petitioner Escovitch guilty as charged in all eight counts.

On February 14, 1949 the application for bail of petitioners was approved by the United States Court of Appeals for the Sixth Circuit and petitioners have been free on bail since the date of said order. The opinion of the Court of Appeals was filed on November 30, 1949.

A.

STATEMENT OF THE CASE

Petitioners were indicted on May 15, 1948 for alleged violation of the provisions of Sec. 1731 (a), Title 12, U. S. C., which are as follows:

> "1731. Penalties.—(a) Whoever for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation *with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan,* advance of credit, or mortgage, insured by the said Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of the said Administration under this Act, *makes, passes, utters, or publishes, or causes to be made, passed, uttered, or published any statement, knowing the same to be false, or alters,* forges, or counterfeits, or causes or procures to be altered, forged, or counterfeited, any instrument, paper, or document, or utters, publishes, or passes as true, or causes to be uttered, published, or passed as true, any instrument, paper, or document, knowing it

to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be punished by a fine of not more than $3,000 or by imprisonment for not more than two years, or both." (Emphasis ours.)

Upon the trial, which was held in the United States District Court for the Southern District of Ohio, Western Division, in Dayton, Ohio, there was no testimony or evidence offered by petitioners, so that there is no dispute as to facts.

The indictment, which was filed on May 15, 1948, is in eight counts and involves four separate transactions (R. 1 to 7).

Petitioner Escovitch is charged in each of the eight counts of the indictment, while petitioner Cohen is charged in the first six counts only.

Both petitioners are charged in counts 1, 3, and 5, and petitioner Escovitch is charged in count 7, with having made, passed, uttered and published and/or to have caused to be made, passed, uttered and published a document entitled "FHA Title One Credit Application," for the purpose of obtaining a loan from First Discount Corporation, Dayton, Ohio (in counts 1, 3 and 5), and Commercial Credit Corporation, Dayton, Ohio (in count 7), *with the intent that such loan would be offered to the Federal Housing Administration for insurance, and for the purpose of influencing the action of the Federal Housing Administration, knowing that such document was false in that the signatures* (which are, of course, different in each of the counts) *were obtained on said documents by fraud and misrepresentation, that the signers in each case did not intend to apply for an advance of credit, and that such documents were submitted to First Discount Corporation or Commercial Credit Corporation without the knowledge or consent of the signers.* (Emphasis ours.)

Both petitioners are charged in counts 2, 4 and 6, and petitioner Escovitch is charged in count 8, with having made, passed, uttered and published and/or to have caused to be made, passed, uttered and published an "FHA promissory Note" for the purpose of obtaining a loan from First Discount Corporation, Dayton, Ohio (in counts 2, 4 and 6), and Commercial Credit Corporation, Dayton, Ohio (in count 7), with intent that such loan would be offered to the Federal Housing Administration for insurance, and for the purpose of influencing the action of the Federal Housing Administration, well knowing said notes to be false in that the signatures were obtained on said notes by false and fraudulent representations by petitioners, and that at the time of signing said notes the parties signing the same did not then and there know that the paper they affixed their signatures thereto was a promissory note.

To these charges each of the petitioners entered a plea of Not Guilty (R. 7).

Upon the trial, the testimony and evidence produced by the government demonstrated that the circumstances surrounding each of the four transactions involved were substantially identical.

In each transaction petitioners had proceeded in the same manner as they had proceeded in the other transactions, and the only important differences between the four transactions were in the dates, the identity of the parties involved, and in counts seven and eight, the construction company and the loan institution to which the papers were presented.

For this reason, and in order to present a more coherent and concise summary of the trial proceedings, the four separate transactions will be treated as one, although an effort will be made to point out any variations which appear to be material.

Petitioner Escovitch first appeared at the home of Mr. and Mrs. Ray at 1632 Weaver Street in Dayton, Ohio, in

the early part of 1946. Escovitch told the Rays that he had a plan whereby their home could be re-sided without cost to them.

He stated that as a part of an advertising scheme he and his associate (Cohen or Phillips) were authorized to choose a model home in the district which would be used to display and advertise their siding (R. 10, 11, 12).

Escovitch said that he and his associate had chosen the Rays' home, after a careful survey of the district, because their home would show up to best advantage (R. 11).

Mr. Ray replied by stating that he did not care for siding, and that he would rather have his house painted (R. 11).

Sometime during the ensuing conversation, petitioner Cohen joined the group, was introduced as Mr. Phillips, and assisted Escovitch in attempting to persuade the Rays to have their home re-sided (R. 13).

After being told by Mr. Ray that he did not care for siding, petitioners assured Mr. Ray that if he took advantage of their plan, the re-siding of his home would cost him nothing. Ray was told that in order to promote sales, the company represented by petitioners would put the siding on his home, and in turn Mr. and Mrs. Ray were only to welcome prospective customers, to be brought to them by petitioners, to their home and display the siding to such customers (R. 10, 11, 60, 81).

In return for displaying the siding on their home, the Rays were told that they would receive a $25.00 check for each prospect who purchased a siding job (R. 10, 81).

These checks were to be mailed to the Rays by the Dayton Construction Company (R. 12). Petitioners stated that the checks would continue to be sent to the Rays for thirty-six months, but that "by the prospects they had, and the way they had it figured out," the cost of re-siding the Ray home would be paid off in thirteen weeks. The Rays were told

they might receive receive checks at the rate of from one to three per week, *and that when the checks were received, they were to send $22.00 from each check to the Dayton Construction Company (R. 10, 12, 49, 81, 82).*

On the other hand, petitioners told the Rays no checks at all might be received in some months, but these periods would be taken care of by those months in which several checks would be received (R. 83).

Convinced by this argument, Mr. and Mrs. Ray agreed to permit petitioners to re-side their house (R. 13). Petitioners then produced "some papers," and asked Mr. and Mrs. Ray to sign them, stating that the papers were "just to show that you are the man that is getting the job" (R. 14).

During the course of the conversation between the Rays and petitioners, petitioners had asked numerous questions of the Rays concerning Mr. Ray's place of employment and his wages, how the Rays had acquired their home and whether it was mortgaged, and whether or not the Rays had established credit at any retail stores, etc. (R. 41 to 45, 77, 78, and 91 to 98).

At the same time, petitioner Cohen (Phillips) would occasionally "write on some paper" by the testimony of Mr. Ray (R. 53), although Mrs. Ray denied that anything was written in her presence (R. 77, 78).

At any rate, Mr. and Mrs. Ray signed "two or three" papers (R. 15, 61). Both Mr. and Mrs. Ray testified that when they signed these papers they were given no opportunity to read them, and did not even see any part of the papers except for the line where they signed (R. 17, 50, 76, 87, 88). Neither Mr. nor Mrs. Ray filled in any blanks on any papers, other than their signatures, nor did they ask anyone to fill in any blanks for them (R. 18).

When signing the papers, the Rays stated that they were not aware of the fact that they were signing an F. H. A.

Title I Credit Application or an F. H. A. Promissory Note, and did not intend to sign either (R. 17, 76, 77).

When Government Exhibits No. 1 (F. H. A. Title I Credit Application) and No. 2 (F. H. A. Promissory Note) were shown to Mr. and Mrs. Ray, they readily identified the signatures thereto as being theirs, but, as pointed out above, denied ever having read either paper before (R. 16, 20, 62, 63).

Having secured permission to side the Rays' house, and having obtained the signatures of the Rays to these papers, petitioners departed. Within four or five days, the work of completely residing the house had been finished (R. 22, 28).

Several days after the work had been completed, Mr. Rosenthal operating as the Dayton Construction Company, appeared at the home of the Rays and obtained their signature to F. H. A. Title I Borrower's Completion Certificate (Government Exhibit No. 3) (R. 22, 89, 90).

Sometime later the Rays received a "little book" from the First Discount Corporation (R. 23, 24, 105).

Still later, they were contacted by a representative of the First Discount Corporation and by the Federal Loan Administration (R. 99), both of whom inquired as to the reason why the Rays had not made the payments due for the siding work.

No payments were ever made on the promissory note by Mr. and Mrs. Ray (R. 25).

The foregoing facts were brought forth by the testimony of Mr. and Mrs. Elmo Ray who appeared as witnesses for the government.

Mr. Abe Rosenthal stated that in 1946 he operated the Dayton Construction Company, and was engaged in the business of roofing and siding. The government introduced into evidence its Exhibit No. 4, which was a contract dated February 25, 1946, between Rosenthal and peti-

tioners, whereby Rosenthal purchased from petitioners, as "Brokers," "a certain contract dated the 25th day of February, 1946, signed by Elmo Ray for certain work to be done on the premises known as 1632 Weaver Street, Dayton, Ohio. . . ."

The contract further provided that the brokers agreed that when the work was completed in a satisfactory manner, and approved by "the proper financial institution, who will finance the materials to be furnished and the work to be done," then they, the brokers, were to receive the sum of $330.90 from Rosenthal. The contract stated that the brokers had secured the contract (with the Rays) as independent contractors and not as employees of Rosenthal. All this is found on pages 112 and 113 of the Record, and in Government's Exhibit No. 4.

Rosenthal identified Government's Exhibits No. 1 (Credit Application signed by the Rays) and No. 2 (Promissory note signed by the Rays). He stated that when he purchased the Ray contract from petitioners, the Credit Application, Note, and the "Proposal" or contract with the Rays had been turned over to him by petitioners. When Rosenthal received the Ray note, it was in blank except for the signatures, and he had his bookkeeper fill in the blanks (R. 114).

Rosenthal stated that it was the usual procedure for people to bring in notes signed in blank in this manner (R. 123, 124).

Although the application asked for a loan in the amount of $720.00, Rosenthal had the note filled in for the amount of $827.88, the increase representing interest charges as computed on an F. H. A. rate chart (R. 114, 115), using the application, which was filled out when received by Rosenthal, as a guide (R. 124).

Two or three days after receiving the application and note, Rosenthal commenced work on the house, furnishing

and paying for the labor and materials himself, as was his usual procedure (R. 116, 117).

Rosenthal stated that he handled the Ray application and note in the same way that he handled any other application and note in the usual course of business (R. 122). He was free to submit these papers to any one of several finance companies with which he was doing business at the time, or to none at all (R. 122, 123).

When he bought the contract, along with the application and note, from petitioners, Rosenthal had no thought in mind as to which finance company he would submit the application and note. This decision was made after the purchase of the contract from petitioners, and petitioners were not informed or consulted as to which finance company, if any, would be used. Petitioners had nothing whatsoever to do with the actual financing of the job (R. 123).

Neither the application nor note used in the Ray transaction were different from those ordinarily used in the course of Rosenthal's business (R. 123).

When the job was completed, the workmen brought in the completion certificate (Government's Exhibit No. 3), signed by Mr. and Mrs. Ray, to Rosenthal (R. 126, 127).

In the latter part of February, or on the 1st or 2nd of March, 1946, Rosenthal submitted the Application and Note to the First Discount Corporation in Dayton, Ohio, and received the face amount of the Note minus the interest charges, or a total of $720.00 (R. 118, 128). The work of re-siding the Ray's home had been completed at this time, and before the Application and Note left Rosenthal's hands (R. 128).

Rosenthal admitted that the "Proposal" signed by Mr. and Mrs. Ray (Government's Exhibit No. 25) was on a form printed by him and used in the regular course of his business (R. 129). He also stated that when a customer referred another siding job to him and such job was sold,

he, as Dayton Construction Company, would pay such customer $25.00, as stated in the Proposal (R. 130 to 133). No jobs were sold to prospects turned in to Rosenthal by either Mr. or Mrs. Ray, and neither of them ever requested the $25.00 bonus from him (R. 135).

In June or July of 1946, several months after the work of re-siding the home of Mr. and Mrs. Ray had been completed, Rosenthal visited their home. Neither Mr. nor Mrs. Ray complained of the manner in which the work had been done at that time (R. 127).

Mr. Rosenthal stated that during the period in question, he, as Dayton Construction Company, was not a lending institution approved by the F. H. A., and that he was not engaged in the business of a lending agency (R. 121, 122).

Mr. Robert Walker, of Washington, D. C., stated that he had been a special agent in the Federal Housing Administration since 1941 (R. 138). Mr. Walker identified Government's Exhibit No. 5 and 5-A as being the original copy of Title I Loan Report, a document on file in Washington, executed by the First Discount Corporation on March 8, 1946, and wherein the First Discount Corporation reported that a loan was made to Elmo Ray on a note dated March 3, 1946, and that the loan was purchased from the Dayton Construction Company (R. 139, 141).

Mr. Walker stated that the procedure in processing the loan was as follows: the loan was made to Elmo and Gertrude Ray by the First Discount Corporation in Dayton; then the note was forwarded to the home office of the First Discount Corporation in South Bend, Indiana; the home office in South Bend then filled out the Loan Report (Government's Exhibit No. 5 and 5-A), and reported the loan to the Federal Housing Administration for insurance (R. 142). The insurance became effective as of the date of the note, March 4, 1946 (R. 145).

Mr. Walker stated that any loan reported by an approved lending institution must be accepted by the F. H. A. for

insurance. The Commissioner in Washington has no authority to reject any such loan, and can only extend the time within which a loan report may be filed (R. 144 to 146).

The report submitted by the lending institution has no effect upon the matter of whether or not that particular loan is covered by insurance (R. 147-148).

Mr. Walker stated that the Application and Note (Government's Exhibits 1 and 2) were forms approved by the F. H. A. for use by lending institutions.

Mr. Wallace Ceyak, 126 South Delmar, Dayton, Ohio, stated that he is the office manager of the First Discount Corporation office in Dayton, that the home office of First Discount Corporation is in South Bend, Indiana, and that the loan to Mr. and Mrs. Elmo Ray was executed by the Dayton office through the Dayton Construction Company (R. 149, 150).

This concluded the testimony and evidence produced by the government concerning the Ray transaction, and counts one and two of the indictment.

The principal variation in the evidence of the separate transactions is that in the deal with Clifton Hager (counts 3 and 4 of the indictment) it was shown that Mr. Hager cannot read and can write only his name. When he signed the application (Government's Exhibit No. 6) and note (Government's Exhibit No. 7) no one read the contents to him nor did he ask anyone to do so, and he was told by petitioners that the papers were "to show the government that they put the siding on" (R. 159, 160).

Mrs. Hager stated that when she signed the papers she started to read them, and "Phillips (Cohen) came over and he put his hands on my shoulder and he said: 'Go ahead and sign it. That's all right. . . .' All I got to glance was just at the bottom" (R. 208).

Upon the conclusion of the testimony and evidence presented by the Government, counsel for petitioners moved

the court to enter a judgment of acquittal with respect to each of the petitioners on trial on the several counts, and for a directed verdict.

Counsel for appellants also moved to strike the testimony and evidence presented by the Government. Both motions were predicated upon the grounds urged throughout the course of the trial, to wit: that the testimony and evidence did not tend to prove any offense alleged in the indictment and described in the statute; that the indictment fails to state an offense under the laws of the United States, or under 12 U. S. C. A. 1731 (a), as charged in said indictment (R. 369, 370).

These motions were overruled by the Trial Court and the exceptions of counsel for petitioners to the ruling of the court were duly noted (R. 389 to 409).

Thereupon the cause was submitted to the jury, which returned a verdict finding petitioner Phil S. Cohen guilty as charged in the first six counts of the indictment, and finding petitioner Leo Escovitch guilty as charged in all eight counts.

On February 3, 1949, the district court sentenced each of the defendants to serve four years each and each to pay a fine of $3,000.00. There were other sentences on other counts which ran concurrently with the four year sentences aforesaid (R. 441 to 444).

Since the trial and conviction of the petitioners, to-wit: on September 21, 1949, in the United States District Court in Dayton, Ohio, the government filed its civil suit Number 1140 against Walter V. and Mary Propolski, to collect the unpaid balance due on the note described in Count Eight of the indictment herein, which note was determined by the Court of Appeals for the Sixth Circuit to be "false ab initio."

STATEMENT OF JURISDICTION

Petitioners submit herewith their statement showing the basis of this court's jurisdiction in the above entitled cause:

A. The statutory jurisdiction of this court to review the judgment here complained of is conferred by the Act of June 25, 1948, C. 646, Section 1, 62 Stat. 928, (Fed. Code Ann., Title 28, Sec. 1254).

B. The statute of the United States which is involved herein is Section 1731(a), Title 12, U. S. C., included in the Act of June 27, 1934, C. 847, Sec. 512, 48 Stat. 1265, as amended, and otherwise known as the National Housing Act, which section provides as follows in Paragraph (a):

> "1731. Penalties.—(a) Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage, insured by the said Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of the said Administration under this Act, makes, passes, utters, or publishes, or causes to be made, passed uttered, or published any statement, knowing the same to be false, or alters, forges, or counterfeits, or causes or procures to be altered, forged, or counterfeited, any instrument, paper, or document, or utters, publishes, or passes as true, or causes to be uttered, published, or passed as true, any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be punished by a fine of not more than $3,000.00 or by imprisonment for not more than two years, or both."

C. Petitioners were each sentenced on February 3, 1949 to imprisonment for four years and each to pay a fine of

$3,000.00 by the United States District Court for the Southern District of Ohio, Western Division, following the return of a verdict on January 29, 1949 finding Petitioner Cohen guilty as charged in the first six counts of the indictment and finding Petitioner Escovitch guilty as charged in all eight counts.

On February 3, 1949 Petitioners filed their Notice of Appeal to the United States Court of Appeals for the Sixth Circuit from said judgment and sentence.

On October 14, 1949 said appeal was argued and submitted to the Court of Appeals, and on November 30, 1949, said Court of Appeals affirmed the conviction and sentence as above set forth, in an opinion by Allen, C. J., in which Hicks and Simons concurred.

On December 19, 1949, Petitioners filed a Petition for Rehearing in said Court of Appeals, which was denied without opinion on January 16, 1950.

It is the judgment of said Court of Appeals which Petitioners seek to have reviewed by this Honorable Court.

On June 9, 1948, petitioners moved to dismiss the indictment on the grounds that it did not state facts sufficient to constitute an offense against the United States (R-438). This motion was overruled by the District Court on November 2, 1948.

Throughout the course of the trial and at the close of the government's case objections were made to the indictment on the same grounds (R-369, 370), and each such objection was overruled.

QUESTIONS PRESENTED

1. Can a person be prosecuted by the government in a criminal indictment with passing a false statement (of which a promissory note was a part) where collection of said promissory note was sued for by the government in the same United States District Court where the conviction occurred?

In other words, can a promissory note be false ab initio on the criminal side of the United States District Court, and valid on the civil side of the same court?

2. Where a statute of the U. S. [12 U. S. C. A. 1731 (a)] makes it a crime for a person to make, pass, utter, publish, or cause to be made, passed, uttered, or published, any statement, knowing the same to be false, with intent that a loan or advance of credit shall be offered to, or accepted by, the Federal Housing Administration for insurance, can such a person be convicted of a crime under this section when the uncontradicted evidence is that such person had no control over the disposition of any of the documents and had no voice in determining who would finance the work, or whether or not the loans, if such were obtained, should be offered to, or accepted by the F. H. A. for insurance, such person being by the uncontroverted testimony an independent contractor who merely received a commission for the jobs he obtained?

3. Can an action which is not criminal at the time of its commission be converted into a crime at a subsequent time by the independent action of other parties?

4. Does the indictment against petitioners, in any of the eight counts therein contained, sufficiently state an offense under the laws of the United States or under 12 U. S. C. A. 1731(a), as charged in said indictment?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. *In the decision sought to be reviewed the Court of Appeals has decided an important question of federal law which has not been, but should be settled by this court. This case is the first time an attempt has been made by the government to assert criminal liability under 12 U. S. C. 1731 (a) against persons who passed statements admittedly containing no material falsity to others who were not lending agencies insured under the Federal Housing Act. No other court has passed upon this question, and it is submitted that the matter is one of sufficient importance to justify consideration by this court.*

2. *The Court of Appeals of the Sixth Circuit has decided a federal question in a way probably in conflict with the decision of the Supreme Court of the United States in United States* v. *Fox, 95 U. S. 670, 24 L. Ed. 538, which holds that an act which is not criminal at the time of its commission cannot be converted into a crime at a subsequent time by the independent action of other parties.*

3. *The Court of Appeals has rendered a decision which is in conflict with the decision of the Court of Appeals for the Eighth Circuit in the case of Terry* v. *United States, 131 Fed. (2d) 40, where it was held, under identical facts, that there had been no violation of Section 35 A, Criminal Code, 18 U. S. C. Section 80. Although the statutes involved were not the same in the two cases, it is submitted that the same general principles must be present to support a conviction under either statute, and that identical facts cannot support an acquittal under 18 U. S. C. Sec. 80 and a conviction under 12 U. S. C. 1731(a).*

4. *The Court of Appeals has decided a federal question in a way probably in conflict with the decision of the United States Supreme Court in United States* v. *Cruikshank et al, 95 U. S. 542, 557, 23 L. Ed. 588, which sets forth the*

allegations necessary for a sufficient indictment in the Federal Courts.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court directed to the Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings in this suit, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the Sixth Circuit be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated: February 15th, 1950.

PHIL S. COHEN,
LEO ESCOVITCH,
Petitioners.

By:

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403 Keith Bldg.,
Dayton, Ohio,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION

ARGUMENT

I. The first question to which the Petitioners have referred under the heading "Questions Presented" is, **"Can a person be prosecuted by the Government in a criminal indictment with passing a false statement (of which a promissory note was a part) where collection of said promissory note was sued for in the same United States District Court where the conviction occurred?"**

In other words, can a promissory note be false ab initio on the criminal side of the United States District Court and valid on the civil side of the same Court?

One of the notes which was obtained by the Petitioners was obtained from Mr. and Mrs. Walter Propolski (Count 8 of the Indictment). The indictment charges that this note, among other papers, was false in that the signatures were obtained on said note by false and fraudulent representations by Petitioners, and that at the time of the signing of said note the parties signing the same did not then and there know that the paper they affixed their signatures thereto was a promissory note. *The Circuit Court of Appeals for the Sixth Circuit said in its opinion, Page 5, "The credit application and note in each transaction were false ab initio."*

After the conviction in the United States District Court at Dayton, to-wit, on September 21, 1949, in the United States District Court at Dayton the Government filed its civil suit No. 1140 against Walter V. and Mary Propolski, to collect the unpaid balance due on the note described in Count 8 of the Indictment. In other words, the Government has "blown hot and cold" because it has criminally prosecuted the Petitioners on the theory that this note is false and therefore void, and turned around and filed a suit in

the same United States District Court on the same note claiming that the Propolski's owe the money on that note. If the note was false—if it was void—if, as the Circuit Court of Appeals said, it was void ab initio—then by what stretch of the imagination can the Government seek to collect on that same note?

And yet, the Petitioners were convicted of passing for insurance to the FHA this same note, which was never proved, in fact or in law, to be false.

There was an application and a note in each one of the transactions referred to in the indictment. **At Page 196 of the Record, the United States District Attorney said, "If the Court please, the Government will admit that there are no material false statements in these applications, if that will save time. You may read it to the jury and we will admit that there is no material falsity."**

II. The second question to which the Petitioners have referred is, **"Where a statute of the United States [12 USCA 1731(a)] makes it a crime for a person to make, pass, utter, publish, or cause to be made, passed, uttered or published, any statement knowing the same to be false, with intent that a loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, can such a person be convicted of a crime under this section when the uncontradicted evidence is that such person had no control over the disposition of any of the documents and had no voice in determining who would finance the work, or whether or not the loans, if such were obtained, should be offered to, or accepted by the FHA for insurance, such person being by the uncontroverted testimony an independent contractor who merely received a commission for the jobs he obtained?"**

The uncontradicted testimony shows that the Petitioners were independent contractors who obtained applications and notes for the siding of houses; that there was no ex-

pression of intention or promise on the part of either petitioner to obtain or cause such insurance to be obtained in respect to the loan. The notes were not payable to the FHA. Exhibit 2 on page 449 of the Record shows that the note was payable to the Dayton Construction Company. Exhibit 7 on page 459 of the Record shows a note payable to the Dayton Construction Company. Exhibit 14 on page 471 of the Record shows a note payable to the Dayton Construction Company. Exhibit 22 on page 487 of the Record shows a note payable to the Dayton Construction Company. These are all the notes that were introduced in evidence and none of them were payable to the FHA.

Each of the concerns to whom the petitioners sold the contracts and notes was free to retain its notes to its own use and each was entirely independent of any control or direction of petitioners in that matter.

In each of the transactions forming the basis for the eight counts of the indictment, petitioners worked as independent contractors, and were not employees of the construction companies to whom they transferred the applications and notes (R. 112, 113, 221, 275, 276, 333—Gov't Exhibits Nos. 4, 10 and 18 and 19).

Rosenthal, owner of the Dayton Construction Company, who received the applications and notes involved in the first three transactions from petitioners, stated that he handled the note and application involved in the first transaction in the same manner that he handled any application and note in the usual course of business (R. 122). He stated that he was free to submit the papers to any one of several finance companies with which he was doing business at the time, or to none at all (R. 122, 123).

Rosenthal stated that the decision as to which finance company he would submit the applications and notes was made after the purchase of the contracts from petitioners, and petitioners were not consulted or informed as to which

finance company, if any, would be used. Petitioners had nothing whatsoever to do with the financing of the jobs (R. 123).

Mr. Barton, owner of the Federal Construction Company, who received the application and note involved in the last transaction from petitioners, stated that under the terms of his contract with petitioner Escovitch, he (Barton) was to *handle the application,* furnish the material, supervise the work, complete the job, *collect the money on the same,* and then pay the brokerage fee to Escovitch (R. 334).

In other words, *the record shows conclusively that when petitioners transferred or sold the various applications and notes to the construction companies, they no longer had any control over the disposition of such papers, and had no voice in determining who would finance the jobs or whether or not the loans, if such were obtained, should be offered to or accepted by the F. H. A. for insurance.*

Nothing in the notes, applications or the contracts with petitioners bound the construction companies to offer these papers to any finance company, or to see that the loans were insured by the F. H. A. That such happened to be done in each instance was solely because of the action of the construction companies, and they were in no way controlled or influenced by petitioners to take such action.

In the case of *Terry* v. *United States* (C. C. A. 8th, 1942), 131 Fed. (2d) 40, the court in discussing the provisions of section 1731 (a) (d) (e) (f), points out that Congress clearly meant an act to be punishable under this section only where "the intent to affect the exercise of federal authority exists." At page 44 of 131 Fed. 2d, the court said:

> "It is clear that the Housing Administration had no cognizance of the Williams loan transaction on which

> the indictment rests at the time of the commission of the acts charged against defendant in respect to that transaction. *Whether the administration would or would not obtain such cognizance depended entirely upon the free will of other parties over whom defendant had no control, and it is contrary to elemental principles of the criminal law that an act which is not criminal at the time of its commission may be converted into a crime at a subsequent time by the independant action of other persons.*" (Emphasis ours.)

In support of this latter proposition, the court in the *Terry* case cited the following:

> *United States* v. *Fox*, 95 U. S. 670, 24 L. Ed. 538;
> *United States* v. *Dietrich* (C. C.), 126 F. 676;
> In re *Ye Gee* (D. C.), 83 F. 145;
> *United States* v. *Crittenden* (D. C.), 24 F. Supp. 84.

The court in the *Terry* case also stated at page 44 of 131 Fed. 2d as follows:

> ". . . It is very plain that the act here charged against the defendant, of making and causing to be made, and using and causing to be used a certificate containing fraudulent statements, was the kind of an act particularly in contemplation of section 1731, *but Congress was at pains to make it punishable by federal authority only in the cases where it manifestly ought to be so punished, i.e., in the cases where the intent to affect the exercise of federal authority exists.*" (Emphasis ours.)

For these reasons the court of appeals in the *Terry* case *reversed the judgment of conviction by the trial court, and held that the defendant could not have had the requisite intent to justify conviction under the circumstances.*

In like manner, it was impossible for petitioners herein to have had the intent that the loans should be offered to

or accepted by the Federal Housing Administration for insurance, or to have intended to influence in any way the actions of said administration.

Once petitioners had turned over the papers to the construction company they had nothing further to do with the transaction.

Rosenthal (R. 121, 122) and Barton (R. 332, 333), both stated that at the time they received the papers from petitioners they were engaged in construction and remodeling work. *Neither Rosenthal or Barton were lending institutions or insured by the F. H. A.*

Whether or not the administration would obtain cognizance over the loan transactions here involved, as in the *Terry* case, supra, depended entirely upon the free will of other parties over whom appellants had no control.

At the time petitioners turned over these papers to the construction companies they had committed no crime under section 1731 (a). Surely it cannot be held that the acts which were not a crime at the time of their commission can become such a crime at a later period by the independent action of these construction companies.

As stated in *United States* v. *Dietrich* (C. C.), 126 Fed. 676, cited in the *Terry* case at page 45 of 131 Fed. 2d:

> "This is a prosecution for a criminal offense. To be punishable, the act charged must have possessed at the time when its commission was complete, every element necessary to its criminality under the statute. A completed act which is not an offense at the time of its commission cannot become such by any subsequent act of the party charged, or of another, with which it has no connection; and this is true whether the first act was done for a good or bad purpose. . . ."

The acts with which petitioners are charged were not an offense under section 1731 (a) at the time of their com-

pletion, and therefore, it cannot be said that the acts later became such an offense because of the action of the construction companies.

It is very important to note that the petitioners did not get paid their commissions until after the work was done and after the customers signed completion certificates. In every instance the siding work was done in accordance with respective agreements, after the papers were delivered by the petitioners to Rosenthal and Barton, respectively. As has already been said, Rosenthal and Barton could have gone to anyone they pleased to finance the jobs or could have financed them themselves. The mere fact that the papers were on FHA forms proves absolutely nothing. With these facts uncontroverted, how can it be said that these petitioners, for the purpose of obtaining a loan with the purpose that such loan or advance should be offered or accepted by the FHA, presented false documents?

Section 1731 (a) does not provide that it is a crime to pass documents which were obtained by fraud and misrepresentation (which fact is denied) or which the signers had affixed their signatures thereto without knowing the nature of the papers. Therefore, the United States District Court should have sustained the motions of the petitioners to quash the indictment.

III. The third question to which the Petitioners have referred is, **"Can an act which is not criminal at the time of its commission be converted into a crime at a subsequent time by the independent action of other parties?"**

The *Terry* case, supra, is very similar in many respects to the case at bar, and a careful examination of this case should prove of much value. In that case the United States Court of Appeals for the 8th Circuit reversed the conviction.

The *Terry* case involved an appeal from conviction and sentence under two indictments charging violation of sec-

tion 35 A, Criminal Code, 18 U. S. C. A. section 80, which provides in part as follows:

> "Whoever shall knowingly and willfully . . . make or causes to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any manner within the jurisdiction of the United States . . . shall be fined, etc."

The facts in the *Terry* case showed that an application for credit, promissory note, and completion certificate, all of which were on printed forms and contained references to the Federal Housing Authority, had been completed and contained false and fraudulent representations, i.e., the applicants had stated that they owned the property, that improvements had been made, etc., when in fact they did not own the property, no improvements had been contemplated or made, etc.

The appellate court stated that there was substantial evidence to indicate that the signature of the applicants in the *Terry* case had been obtained by fraud and trickery, but did not elaborate further on this point. Under the circumstances we must assume that the signatures had been obtained by the fraud and trickery of the defendants.

The evidence in the *Terry* case showed that Commercial Investment Trust, Inc., a Delaware corporation, was an insured institution under the F. H. A., and had the right to obtain insurance from the F. H. A. against loss in respect to loans of the character set out in 12 U. S. C. A., section 1702 (a), as it might acquire and desire to be covered.

Commercial Investment Trust, Inc., owned all of the stock of the C. I. T. Corporation. Each corporation was distinct, but had entered into contracts which stated that C. I. T.

Corporation was engaged in purchasing secured installment obligations, etc., and that it proposed to offer certain of such paper for sale to the investment trust company. The investment trust company in turn agreed to buy such of the paper as was acceptable to it and on terms set forth in the contract. C. I. T. Corporation was not an insured institution. The collection of the paper was left to C. I. T. Corporation, the uninsured corporation.

In the application the applicants had applied to C. I. T. Corporation (uninsured) for a loan of $500.00 to be used for improving a house alleged to have been owned by them and to have been bought by them for $1,500.00. Both statements were false.

In the certificate, the applicants stated that all the material and labor had been furnished in accordance with their application for a loan. This statement also was false.

The application had been presented to the King Lumber Co., a dealer in building material, which company presented it to C. I. T. Corp. for approval. Upon receipt of such approval the lumber company made delivery of material to the value of $144.25.

Then a promissory note in the amount of $574.87, payable to the Lumber Company and signed by the applicants, was presented to the Lumber Company. After deducting the $144.25 due it, the Lumber Company issued its check in the amount of $500.00 to the co-defendant. Then the Lumber Company transferred the $574.87 note to the C. I. T. Corporation, which in turn sold it to the trust investment company. The latter company obtained insurance in respect to the note from the F. H. A.

Over objection, the government showed that the F. H. A. had been forced to reimburse the holder of the note upon accrual of loss by non-payment.

The principal question which the court in the *Terry* case had to determine was whether or not the acts of the

defendants were "in a matter within the 'jurisdiction' of the United States."

In determining this question, the court of necessity was required to construe the Federal Housing Act, and, more particularly, section 1731 of 12 U. S. C. A.

In its preliminary remarks, the court pointed out that the references in the blanks in the *Terry* case were (by legal implication) sufficient to remind the borrower that the loan was of such form that the obligation might become the subject of an insurance contract between the F. H. A. and some eligible institution which might acquire and request insurance in respect to it.

However, the court also pointed out that nothing in the blanks was intended as a representation that either the C. I. T. Corporation, to which the application was addressed, or the lumber company, to which the note was made payable and delivered, was an agency of the government or was entitled to have credit insurance under the Act. There was no expression of intention or promise on the part of either to obtain or cause such insurance to be obtained in respect to the loan.

At page 43, of 131 Fed. 2d, the court said:

> ". . . The information sought to be . . . stated in the forms was merely such as is required generally by lenders making such loans, and the promissory note is an ordinary negotiable form except as stated. . . . *So far as appears, each of the concerns was free to retain its notes to its own use and each was entirely independent of any control or direction of the defendant in that matter. . . .*" (Emphasis ours.)

It might be well to point out to the court at this time that the applications in the instant case, like those in the *Terry* case, merely contained information which is required generally by lenders making such loans.

It is true that the applications were headed "F. H. A. Title I Credit Application," were addressed to the First Discount Corporation, which is an insured institution under the F. H. A., in the first three transactions, and that the applications state that: "This application is submitted to obtain credit under Title I of the National Housing Act."

But nothing in the applications or notes in the instant case was intended as a representation that either the lending institution to which the application was addressed, or the construction company to which the notes were made payable, was an agency of the government or was entitled to have credit insurance under the Act. There was no expression of intention or promise on the part of either to obtain or cause such insurance to be obtained in respect to the loan.

Therefore, it was impossible for petitioners herein to have had the intent that the loans should be offered to or accepted by the Federal Housing Administration for insurance, or to have intended to influence in any way the actions of said administration.

Once petitioners had turned over the papers to the construction company they had nothing further to do with the transaction.

Rosenthal (R. 121, 122) and Barton (R. 332, 333), both stated that at the time they received the papers from petitioners they were engaged in construction and remodeling work. Neither Rosenthal or Barton were lending institutions or insured by the F. H. A.

At the time petitioners turned over these papers to the construction companies they had committed no crime under Section 1731(a). The acts which were not a crime at the time of their commission cannot become such a crime at a later period by the independent action of these construction companies. United States v. *Fox,* 95 U. S. 670, 24 L. Ed. 538.

As stated in *United States* v. *Dietrich* (C. C.), 126 Fed. 676, cited in the *Terry* case at page 45 of 131 Fed. 2d:

> "This is a prosecution for a criminal offense. To be punishable, the act charged must have possessed at the time when its commission was complete, every element necessary to its criminality under the statute. A completed act which is not an offense at the time of its commission cannot become such by any subsequent act of the party charged, or of another, with which it has no connection; and this is true whether the first act was done for a good or bad purpose. . . ."

The acts with which petitioners are charged were not an offense under section 1731 (a) at the time of their commission, and therefore, it cannot be said that the acts later became such an offense because of the action of the construction companies.

IV. The fourth question to which the Petitioners have referred is, **"Does the indictment against appellants, in any of the eight counts therein contained, sufficiently state an offense under the laws of the United States, or under 12 USCA 1731(a), as charged in said indictment?"**

In determining whether the indictment in this case is sufficient to charge an offense against the laws of the United States, or under 12 U. S. C. A. 1731 (a), it is necessary to refer to the statute under which the indictment is drawn, the Federal Rules of Criminal Procedure, the statutory and constitutional requirements governing the sufficiency of indictments in Federal Courts, and the applicable decisions of the Federal Courts in each of these categories.

To determine whether any indictment is sufficient, the first two points are the consideration of the exact words of the statute describing the offenses created by Congress, and the general rules set up to provide a standard for the charging pleading within that statute.

The Supreme Court of the United States, in *United States* v. *Cruikshank et al.*, 92 U. S. 542, 557, 23 L. Ed. 588 (1875), stated as follows concerning the necessary allegations of an indictment in the Federal Courts:

> "In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend VI. In *United States* v. *Mills*, 7 Pet. 142, this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' and in *United States* v. *Cook*, 17 Wall. 174, that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars.'
> 1 Arch. Cr. Pr. and Pl., 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. *For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances.*" (Emphasis ours.) See also discussion of this subject in 27 Am. Juris. Indictments and Information, Sec. 54, pp. 621, 622.

It is true that the present Rule 7 (c) of the Federal Rules of Criminal procedure, as interpreted by the courts, renders

an indictment drawn in the language of the statute ordinarily sufficient.

> *Robertson* v. *United States* (CCA-Tex., 1948), 168 Fed. 2d 294;
> *Mellor* v. *United States* (CCA-Neb., 1947) 160 Fed. 2d 757.

But, as pointed out in *Lowenburg* v. *United States* (CCA-Colo., 1946), 156 Fed. 2d 22, 23:

> "While the strict rules of pleading in criminal prosecutions have been relaxed, the fundamental functions and requirements of indictments have not been altered or modified. The purpose of an indictment still is to inform the accused of the offense with which he is charged, and this it must do with sufficient clarity to enable him to prepare his defense and to plead the judgment of conviction, if any, as a bar to further prosecution."

Whether the various counts of the indictment here involved are sufficient therefore must be determined in the light of these principles.

The indictment in question does not state facts which constitute any offense described in the statute under which it was drawn. The statement of fact describing the essential act complained of, namely: "Presenting a document that was false in that it was obtained by fraud and misrepresentation" is not mentioned in the statute as an offense. Neither is it made an offense in the statute to present a note claimed to be false in that at the time of presentation the makers of the note did not know the nature of the paper to which they affixed their signatures.

If Congress had seen fit to make these two acts an offense, it may well be that it could have done so, but since it did not do so, it seems clear that no court has the power to

hold these, or any, defendants upon an indictment which charges only these acts, and no act whatever of the kind made unlawful by the statute.

What is the test by which a court can determine when a crime has been committed under this statute?

Any citizen must be reasonably apprized as to what acts on his part are prohibited. Even if the statute by its terms authorized prosecution for presenting a credit application "obtained by fraud and misrepresentation," would there not have to be some definition of what constitutes "fraud and misrepresentation" within the intent of Congress? If a statute is so vague that a citizen can not tell whether the step he is about to take is prohibited or not, it is not a valid criminal law.

> *Connally, Comm'r* v. *Gen. Const. Co.*, 269 U. S. 385, 70 L. Ed. 322, 328 (Annotation).
> See also: 14 *American Jurisprudence, Criminal Law*, sec. 19, p. 773.

The indictment charges that Elmo and Gertrude Ray, etc. did not know what they signed. This is no crime! A careful reading of the indictment enables one to understand that the grand jury had information that Elmo and Gertrude Ray, and the other parties named in the other counts, did not know until after they had signed their names that the nature and legal effect of the paper which they had signed was, in one instance a credit application, and in the other a note. These statements by the grand jury do not charge a crime against any person. Simply stated in other words, it would amount to this: petitioners are guilty of violating the National Housing Act because four customers who received credit did not know that the papers signed by them were credit application and notes respectively. Nothwithstanding the fact that *each one of the four homes involved, was resided and improved.*

There is no act of petitioners set forth which is prohibited by the statute. It is charged that they made, passed, uttered, and published a credit application and note. The petitioners are not charged with any act of fraud, nor is any other person charged in the indictment with any particular act of fraud or misrepresentation. Other than presenting a credit application and note, the petitioners are not charged with doing anything.

The indictment charges that the credit applications and notes were "false" within the provisions of the statute because the signatures thereto had been secured by fraud and false and fraudulent representations, and that the parties involved did not intend to apply for credit, and did not know that they were signing a promissory note.

Yet it is a fundamental principle of the law of negotiable instruments that even the defense of fraud in the factum is precludable by the operation of an estoppel based on negligence.

> *Gross* v. *Ohio Sav. & Trust Co.*, 116 Ohio St. 230, 156 N. E. 205 (1927).
>
> See discussion in Ogden on *Negotiable Instruments* (5th Ed.—1947) sec. 184, p. 344.

The principle has also been applied to non-negotiable instruments, and it has been held that a person who signs an instrument without reading it, when he has the opportunity to read it and can read, cannot avoid the effect of his signature merely because he was not informed of its contents, where the instrument is in the hands of a bona fide purchaser, unless he can show not only that he was induced to execute it by fraud, but also that the execution was without negligence on his part.

> *Standard Mfg. Co.* v. *Slot*, 124 Wis. 14, 98 N. W. 923;
>
> *Montgomery* v. *Scott*, 9 S. C. 20, 30 Am. Rep. 1.
>
> See 23 *American Jurisprudence, Fraud and Deceit*, Sec. 170, p. 982; Sec. 171, p. 984.

In other words, petitioners were charged in this indictment with making, passing, etc. documents and notes known by them to be false because of facts which, assuming their existence, *do not necessarily render such documents and notes false in law.*

Surely this cannot be considered a proper charging of an offense. Surely the charges set forth did not serve to "set forth the offense with clearness and all necessary certainty, to apprize the accused of the crime with which he stands charged!"

As a matter of fact, when viewed in this light, the indictment merely states the charges in the language of the statute, and then, in attempting to state facts to particularly set forth the nature of the falsity of the applications and notes, adds certain allegations which may or may not mean that the requisite falsity was present. Such an attempt does not fulfill the requirements of a sufficient indictment as set forth above.

V. The Government did not prove the existence of the requisite purpose and intent.

In specific terms Section 1731 (a) of Title 12, U. S. C. A. states that the "false statements" must be made or passed for the purpose of obtaining a loan or advance of credit "with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance" or "for the purpose of influencing in any way the action of said Administration."

In the case of *C. I. T. Corp.* v. *United States* (CCA 9th, 1945), 150 Fed. (2d) 85, several defendants had been convicted on a charge of conspiracy to violate the provisions of 12 U. S. C. 1731.

In speaking of section 1731 and what must be shown to support a conviction for violating its terms, the court said:

> "It is not sufficient to prove Thomas guilty to show that he signed a document with an untruthful state-

ment which might tend to influence the administration. *The burden on the government is to prove the knowledge of its falsity and his criminal intent so as to influence the Administrator's acceptance of the borrower's note. This proof may be by circumstantial evidence, but such facts must be proved.*" (Emphasis ours.)

In the above case, the conviction of Thomas was reversed.

At no place in the record can there be found testimony or evidence which prove that petitioners had such knowledge of the falsity of the papers, or that they had the criminal intent that a loan should be offered to or accepted by the Administration, or that they intended in any way to influence the actions of said Administration.

The Court of Appeals for the 4th Circuit, in the case of *Reass* v. *United States*, 99 Fed. 2d 752, reversed the conviction of the defendant for knowingly making false statements for the purpose of influencing the action of a Federal Home Loan Bank upon application for loans, in violation of 12 U. S. C. A. 1441 (a).

At page 755 of 99 Fed. 2d, the Court of Appeals stated:

". . . The statute on which the indictment is based was passed to protect the Federal Home Loan Banks from fraudulent attempts to secure favorable action of applications for loans and like matters. *The gist of the offense is the attempt to influence the corporation, . . . and communication of false statements to the corporation constitutes the very essence of the crime. . . . The mere assembling of the material and its arrangement in a written composition containing the misrepresentation of fact can have no effect, and it is only when they are communicated to the lending bank that the crime takes place.*"

The evidence presented by the government in the case at bar discloses that petitioners did no more than assemble

the material and arrange it in a written composition. As pointed out in the Reass Case, this was no crime.

The communication of the material and statements to the lending institution was accomplished at a later date by the construction companies without any knowledge or control of petitioners.

Petitioners submit that if the Fourth Circuit Court had passed on Section 1731(a) it would have said the same thing that it said concerning Section 1441(a), because, as has already been said, Section 1441(a) was for the protection of the Federal Home Loan Bank and Section 1731(a) was for the protection of the Federal Housing Administration.

CONCLUSION

Petitioners submit that this case should be reviewed by this Honorable Court.

This is the first prosecution and conviction under Section 1731(a), known as the Federal Housing Administration Act, and the rights of the Government and of those prosecuted under the Act should be judicially determined. On page 191 of the Record Judge Nevin of the United States District Court, stated:

. . *"I have been informed by somebody and I saw it in the papers last night, this is the first case of this kind where there has been an indictment of this kind. I haven't any doubt it is true, because it has been my experience that I get all the first cases for some reason or other. I don't know why other judges don't get them sometime. So, I have to blaze the way without any precedent.* For that reason, I am giving you the benefit, Mr. Hopping, solely of my understanding of the law. Later on I will tell the jury they have to be bound by my understanding of it, whether I am right or wrong, and I don't claim, of course, to be infallible. But that is just my view of it and based upon that is the reasons

why I keep consistently overruling your objection, at the same time telling you and telling the jury that it is your duty not only your right but your duty to make the objection in order to preserve your record, so this question can be properly presented to some other court." (Emphasis ours.)

The petitioners submit that their conviction should be set aside, because they have played no part in getting insurance from the FHA.

Respectfully submitted,

SIDNEY G. KUSWORM,
Counsel for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 605

PHIL S. COHEN, ALIAS P. H. PHILLIPS, AND LEO ESCOVITCH, ALIAS LEO ESCO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 513-518) is reported at 178 F. 2d 588.

JURISDICTION

The judgment of the Court of Appeals was entered November 30, 1949 (R. 509-510), and a petition for rehearing (R. 525-535) was denied January 16, 1950 (R. 539). The petition for a writ of

certiorari was filed February 14, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the documents involved in this case constitute false statements within the meaning of Section 512(a) of the National Housing Act.

2. Whether the fact that innocent instrumentalities intervened between petitioners and the presentation of false statements to the Federal Housing Administration exculpates them from liability for causing such false statements to be made and uttered.

STATUTE INVOLVED

Section 512(a) of the National Housing Act of June 27, 1934, c. 847, 48 Stat. 1265, as amended by the Act of February 3, 1938, Sec. 9, 52 Stat. 24, 12 U. S. C. 1731(a), provides in pertinent part as follows:

> Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by the said Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the

> action of the said Administration under this Act, makes, passes, utters, or publishes, or causes to be made, passed, uttered, or published any statement, knowing the same to be false, * * * shall be punished by a fine of not more than $3,000 or by imprisonment for not more than two years, or both.

STATEMENT

In count 1 of an indictment in eight counts, petitioners were charged under 12 U. S. C. 1731(a) with having made, passed, uttered and published and having caused to be made, passed, uttered, and published a document entitled "FHA Title I Credit Application," signed by Elmo and Gertrude Ray, for the purpose of obtaining a loan from the First Discount Corporation, Dayton, Ohio, to finance home improvements, with the intent that such loan would be offered to the FHA for insurance and for the purpose of influencing the action of the FHA, knowing that such document was false in that the signatures were obtained by fraud and misrepresentation, that the Rays did not intend to apply for an advance of credit, and that the document was submitted to the First Discount Corporation without the Rays' knowledge or consent. In count 2 petitioners were charged with having made, passed, uttered, and published and having caused to be made, passed, uttered and published an "FHA Promissory Note," signed by the Rays, for the purpose of obtaining a loan from the First Discount Corporation with the intent that such loan should

be offered to the FHA for insurance, and for the purpose of influencing the action of the FHA, knowing the note to be false in that the signatures were obtained by false and fraudulent representations and that at the time of signing it the Rays did not know it was a promissory note. Charges similar to counts 1 and 2 were contained in counts 3 and 4, relating to petitioners' dealings with Clifton and Geneva Hager, and in counts 5 and 6, regarding their transactions with Marvin and Lillie Willett. In counts 7 and 8, relating to transactions with Walter and Mary Propolski, petitioner Escovitch and one Bernie Bender were named as defendants [1] and the lending agency involved was Commercial Credit Corporation, Dayton, Ohio. (R. 1-7.)

A motion to dismiss the indictment was overruled prior to the trial (R. 438-439).

In all four transactions—with the Rays, the Hagers, the Willetts, and the Propolskis—the overall pattern of operation was essentially similar. The dealings petitioners had with the Rays are typical. Petitioners, after going unsolicited to the Ray home, stated that they wanted to put a composition siding on Ray's frame house for advertising or display purposes. The Rays were merely to show the refinished home to prospective customers and there would be no cost whatever to them

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[1] Before trial, Bender pleaded guilty to counts 7 and 8 (R. 424).

for the new siding. Petitioners represented that the Rays would receive a check for $25 from the Dayton Construction Company, which was to furnish the siding, for each customer obtained as a result of displaying the siding job on their home and that they would pay back to the company approximately $22 of each such payment they would receive. Petitioners represented that in this way the job would be paid for within 13 weeks. (R. 10-12, 49-50, 53, 60-61, 82.) At the insistence of petitioners, Ray and his wife signed in blank an FHA Title I Credit Application form (R. 447) and an FHA Promissory Note form (R. 449-450). Escovitch told Ray that he should sign one paper, which turned out to be the FHA credit application, "just to show that you are the man that is getting this job" (R. 14). Since there were other papers on top of the credit application so that he could not see the designation at the top—"FHA Title I Credit Application, Property Improvement Loan" —and since he was merely told to sign where the "X" was, Ray signed the paper without knowing what it was (R. 17). He placed on it only his signature, and did not ask anyone to fill in any blank spaces (R. 18). Similarly, he did not see the designation "FHA Promissory Note" on the other document and did not know that he was signing a promissory note (R. 21, 22). Ray's wife was also unaware that she was signing an FHA credit application or a promissory note (R. 76-77). The

work on the house was finished about four or five days after these transactions with petitioners (R. 22). After the work was completed the Rays also signed an "FHA Borrower's Completion Certificate" (R. 451) for Abe Rosenthal, the supply man who was doing business as the Dayton Construction Company (R. 21). Rosenthal entered into a contract with petitioners to pay them $330.90 as their brokerage commission for obtaining the Ray job (R. 452-453). When the promissory note form was taken to Rosenthal it bore only the Rays' signatures, so his bookkeeper filled in the blank spaces, including the amount of $827.28, which was arrived at by using the FHA interest chart to ascertain the total amount to be repaid upon a loan in the amount of $720 as stated in the application (R. 114-116). After the First Discount Corporation approved the loan application and note, it paid Rosenthal $720, $330.90 of which he paid to petitioners in separate checks of $165.45 as their agreed commissions (R. 117-119). After the Rays defaulted on the note, the First Discount Corporation filed a claim with the FHA, which reimbursed it for the full amount of the loan (R. 287).

With some variations, the Hager (R. 151-242), Willett (R. 242-293), and Propolski (R. 293-369) transactions were consummated in the same manner. Hager was unable to read or write and could only sign his name (R. 157-158). When his wife started to read the papers, petitioner Cohen, using

the alias Phillips, "got up and got her by the shoulders and wouldn't let her read them; told her to go ahead and sign the papers and she would be glad of it" (R. 181, 208). When Willett and his wife "asked if there was a note or any application for loan connected with it in any way, form or fashion * * * they [petitioners] said no" (R. 247). In the Propolski transaction, in which the supply man was one Barton doing business as Federal Construction Company (R. 332) and the loan company was Commercial Credit Corporation, even though the house was owned by Propolski's brother (R. 294), Escovitch, using the alias Esco, stated this did not make any difference (R. 296, 323). Although Commercial Credit Corporation's records showed that Barton made eight payments on the Propolski loan (R. 354), the note was later defaulted and Commercial Credit was reimbursed by the United States in the amount of $1,153.65 (R. 355-356). Reimbursement after default was also made on the Hager and Willett notes (R. 287).

Petitioner Cohen was found guilty on the first six counts and petitioner Escovitch guilty on all eight counts (R. 440). Each petitioner was sentenced to terms of imprisonment aggregating four years and to pay a fine of $3,000 (R. 441-444). The Court of Appeals affirmed the convictions (R. 513-518).

ARGUMENT

1. Petitioners contend (Pet. 29-34) that the indictment does not charge offenses within 12 U. S. C.

1731(a) because it is charged that the signatures on the credit applications and notes were obtained by fraud and misrepresentation, whereas the statute applies only to "false" statements. They argue that the statute does not extend to documents obtained in the manner alleged in the indictment and, in addition, that in any event the notes were "not necessarily * * * false in law" (Pet. 34) because the makers might be estopped by reason of negligence from setting up the defense of fraud (Pet. 33).

Such limited construction of the word "false" as used in the statute is wholly unwarranted. In a very real sense the credit applications and notes were, as the indictment alleged and the proof showed, false documents. They were not what they purported to be, for the victims of petitioners' fraud did not know what they were signing and did not intend to apply for loans or sign notes, but were induced to sign the papers solely by petitioners' misrepresentations.

The enforceability of the notes against the makers is immaterial to the question of the falsity of the documents within the meaning of the statute. We are not here concerned with the liability of the makers on the notes they signed. The statute was designed to protect the Government against fraud in the procurement of insurance of home loans. Petitioners' offense was complete when they caused the false documents to be uttered for the purpose of

influencing the action of the FHA and obtaining insurance.[2]

2. Petitioners also contend that since the suppliers and the lending institutions, over which they had no control, intervened between them and the presentation of the loans to the FHA for insurance, they cannot be held accountable for such presentation (Pet. 19-24); that their acts were not criminal at the time of their commission and would not be made so by the acts of other independent parties (Pet. 24-29). In this connection, they also argue that the proof was insufficient to show that they intended the loans to be offered to the FHA for insurance (Pet. 34-36).

As the Court of Appeals pointed out (R. 517-518), the jury were entitled to infer from petitioners' possession and repeated use of forms "bearing in large letters the well-known symbol 'FHA'" that their purpose was to cause a loan to be made which would be offered to the FHA for insurance. Indeed, there is no other rational explanation of their use of the FHA forms. Further proof that such was their intent is found in the provision in

[2] Petitioners say that following their conviction the Government sued the Propolskis on the note involved in count 8, and they argue, in effect, that such an effort to hold the makers liable in some way forecloses prosecution under 12 U.S.C. 1731(a) (Pet. 18-19). But there is no inconsistency between this prosecution and civil suits on the notes on the theory that the makers were bound by their signatures. Whether they are liable on their notes depends upon the law of negotiable instruments and, even if we assume that they are liable, this would not exculpate petitioners from liability under the criminal statute.

their contracts with Rosenthal that they would not be paid their brokerage fees until the contracts were "approved by the proper financial institution, who will finance the materials to be furnished and the work to be done under and by virtue of" the contracts (R. 452, 462, 477, 478). The inference is thus clear that petitioners knew that FHA insured loans would be consummated through a lending agency.

The same evidence shows that petitioners effectively caused the loans to be presented to the lending institutions and then to the FHA for insurance. Assuming that the offenses under the statute were not complete until the loans were offered to the FHA for insurance, it does not follow, as petitioners contend, that the intervention of innocent agents in the consummation of the offenses exculpates them. For the statute expressly covers the causing of the prohibited acts, and petitioners' conduct in fraudulently obtaining the credit applications and notes and turning them over to their suppliers was the actuating cause in the chain of events leading to the presentation of the loans for insurance, as they intended would be done. Cf. *United States* v. *Sheridan,* 329 U. S. 379, 391.[3]

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[3] See also Section 2(b) of the 1948 revision of Title 18, U. S. C., which provides that "Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such." The Reviser's Note says that this provision "removes all doubt that one who puts in motion or assists in the

Terry v. *United States,* 131 F. 2d 40 (C. A. 8), upon which petitioners principally rely and which involved facts analogous to those here, was a prosecution under Section 35(A) of the Criminal Code, 18 U. S. C. (1946 ed.) 80, the so-called false claims statute, for making and causing to be made certain false statements in a matter within the jurisdiction of the FHA and is for that reason readily distinguishable. The court there held that such a prosecution would not lie under Section 35(A) because the FHA "had no cognizance of the * * * loan transaction on which the indictment rests at the time of the commission of the acts charged against defendant in respect to that transaction. Whether the Administration would or would not obtain such cognizance depended entirely upon the free will of other parties over whom defendant had no control, and it is contrary to elemental principles of the criminal law that an act which is not criminal at the time of its commission may be converted into a crime at a subsequent time by the independent action of other persons" (p. 44). But the court also pointed out that in a proper case such a prosecution would lie under 12 U. S. C. 1731(a), the statute involved here, for it said (p. 44):

> It is very plain that the act here charged against the defendant, of making and causing

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illegal enterprise but causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense."

to be made and using and causing to be used a certificate containing fraudulent statements, was the kind of an act particularly in contemplation of Section 1731, but Congress was at pains to make it punishable by federal authority only in the cases where it manifestly ought to be so punished, i.e., in the cases where the intent to affect the exercise of federal authority exists.

CONCLUSION

There is no conflict of decisions, and no questions are presented meriting further consideration by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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